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No. 849

IN THE

Supreme Court of the United States

October Term, 1943

J. J. BOWMAN and JAMES S. BOWMAN, d.b.a. BOWMAN REALTY COMPANY,

Petitioners,

v.

CHESTER BOWLES, Price Administrator,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Emergency Court of Appeals and

BRIEF IN SUPPORT OF PETITION

J. J. Bowman and James S. Bowman,
doing business as Bowman Realty Company,
323 Hammond Street, Cincinnati 2, Ohio,
Petitioners.

Paul W. Steer,
2215 Union Central Building,
Cincinnati 2, Ohio,
Attorney for Petitioners.

The Johnson & Hardin Co., Law Printers
Cincinnati, Ohio

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PETITION FOR WRIT OF CERTIORARI

To the United States Emergency Court of Appeals

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your petitioners, J. J. Bowman and James S. Bowman, doing business as Bowman Realty Company, pray that a writ of certiorari issue to review the judgment of the United States Emergency Court of Appeals in the cause entitled *J. J. Bowman and James S. Bowman, d.b.a. Bowman Realty Company* v. *Chester Bowles, Price Administrator,* No. 88 on the docket of said Court. Said judgment

became final on March 6, 1944, on denial by said Court of Petitioners' motion for rehearing therein.

In support of this said petition, Petitioners respectfully represent to this Court as follows:

SUMMARY AND STATEMENT OF THE MATTER INVOLVED

Heretofore, on September 29, 1943, Petitioners duly filed a Complaint in the United States Emergency Court of Appeals against the Administrator of the Office of Price Administration, by reason of his denial of Petitioners' Protest No. RPA-III-12-P, duly filed with said Administrator on July 31, 1943, and denied by him on September 1, 1943.

Petitioners' said Complaint was duly docketed as cause No. 88 in said Court, and came on for hearing in Cincinnati on January 13, 1944. Judgment was entered by said Court on February 24, 1944, dismissing said Complaint, and on motion duly made for rehearing, the Court denied said motion by its final Order dated March 6, 1944.

There is lodged herewith, and certified to be correct by the Honorable Herman C. Beasley, Clerk of the United States Emergency Court of Appeals, a transcript of record of said cause in said Court. The transcript includes copies of the following documents and papers:

1. Complaint by Petitioners herein, the complainants in said Emergency Court of Appeals.
2. Answer of Price Administrator, Respondent here and in said Emergency Court of Appeals.
3. Transcript of Proceedings before the Price Administrator.
4. Proceedings in the United States Emergency Court of Appeals other than said Complaint and Answer.

The Complaint and the Petition for Writ of Certiorari herein involve the application of Rent Regulations established by the Price Administrator pursuant to the Emer-

gency Price Control Act of 1942 to Petitioners' housing accommodations in Cincinnati, Ohio.

At the time of the institution of the proceedings, two principal Rent Regulations were effective in the Cincinnati Defense Rental Area, one designated Rental Regulation for Housing (hereinafter referred to as Housing Regulations) providing control over rents for housing accommodations other than hotels and rooming houses; the other, designated Rent Regulations for Hotels and Rooming Houses (hereinafter referred to as Hotel Regulations), which controlled rents for hotels and rooming houses. These Regulations imposed the maximum rent date method of rent control.[1] Both Regulations became effective in the Cincinnati Area on November 1, 1942, and established March 1, 1942, as the maximum rent date.

Petitioners are managing operators of a building in Cincinnati, known as the Rosedale Apartments, containing 32 rental units, and which has been operated for approximately ten years as an apartment hotel. After establishment of the Rent Regulations by the Administrator, Petitioners filed registration statements under the Housing Regulations for each of the 32 rental units, setting forth a variable or sliding scale of rents maintained in said building. This scale provided higher weekly and monthly rates for each apartment when rented on a temporary basis, than it provided for rental on a long term basis; it also provided increased rents when an apartment was let to occupants beyond a specified number. This registration was refused by the Area Rent Director of the Office of Price Administration, on the grounds that the Housing Regulation made no allowance for a sliding or variable scale of rents (Transcript of Proceedings Before the Price Administrator, pp. 3 and 20; Transcript of Record, p 3 & 20.

[1] For explanation of tnis method of control, see *Hillcrest Terrace Corporation* v. *Brown*, 137 Fed. (2d) 663, and *The Lakemore Co.* v. *Brown*, 137 Fed. (2d) 355.

Simultaneously, the Area Rent Director, through his Chief Rent Attorney, advised Petitioners that their sliding scale of rents *then admittedly in operation* might be maintained under the Hotel Regulation, with the consent of the Area Rent Director. Thereupon, Petitioners tendered registration under the Hotel Regulation. After considering this proposed registration, the Area Rent Director found that the provisions of the Housing Regulations were better adapted to the rental practices for the building, and refused to accept Petitioners' registration under the Hotel Regulation.

Upon application for review, the Regional Administrator confirmed the Area Rent Director's Order, whereupon Petitioners filed a Protest before the Administrator, requesting that the Orders previously made be reversed, and that the Area Rent Director be ordered to consent to the registration under the Hotel Regulation, or, in the alternative, that the Price Administrator hold that the Housing Regulation permitted a variable or sliding scale of rents for Petitioners' accommodations.[2]

The Administrator denied the Protest, and the Complaint was filed before the Emergency Court of Appeals.

The Complaint charges, in part, that the announced purpose of the Emergency Price Control Act of 1942, to wit:

> "It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war, and the purposes of this Act are, to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market con-

[2] Whether the Administrator was requested to grant this alternative relief is disputed. Petitioners assert that such prayer was made. The Emergency Court of Appeals found that it was not made with sufficient clarity. This will be further discussed hereafter under the heading "Questions Presented."

> ditions or scarcities caused by or contributing to the national emergency; . . . ''

contemplated, as to rents, a fixing of the status then in operation and not an imposition of new business practices and methods of operation; that the ruling of the Administrator did not fix the status of Petitioners' then current operation, but that it ordered the lowest rent on their rental schedule on the ''freeze date'' and improperly and unlawfully discarded the remainder of their rental schedules.

The Complaint further charged that this destruction of the business practice of long standing and the elimination of part of their rental schedules, is contrary to both the intent of the Emergency Price Control Act of 1942, and the Rent Regulations thereunder, for the reason that paragraph 10 of Section 13, of the Rent Regulation for Housing, defines ''rent'' in this fashion:

> ''Section 13 (10). 'Rent' means the consideration . . . , demanded or received for the use or occupancy of housing accommodations . . .''

and that it did not matter whether the property be considered a hotel or housing unit, since both permit and contemplate a situation in which there can be more than one ''legal maximum rent,'' in Petitioner's case a variable or sliding scale of rents dependent upon term of occupancy.

STATEMENT OF JURISDICTION

Jurisdiction of this cause is vested in this Honorable Court by the provisions of the Emergency Price Control Act of 1942. Section 204 (d) of said Act [50 U. S. C. A. App. Sec. 924(d)] which provides in part as follows:

> "Within 30 days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a Circuit Court of Appeals, as provided in Sec. 240 of the Judicial Code as amended. . . . The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under Section 2 . . ." [of the Price Control Act, which is the Section authorizing rent and price control, and which covers the regulations and orders herein at issue].

The Petitioners have duly followed the procedure set forth in the Emergency Price Control Act, and the subject matter of their Protest before the Price Administrator and before the Emergency Court of Appeals is that specified in the appropriate provisions of the Act, as hereinabove set forth.

QUESTIONS PRESENTED AND REASONS RELIED UPON FOR ALLOWANCE OF WRIT

1. Are the Petitioners entitled to an order construing the Housing Regulations as permitting a variable and sliding scale of rentals? (This was the alternative relief prayed for by Petitioners before the Administrator and the Emergency Court of Appeals, i. e., alternative to the Administrator's acceptance of the registration under the Hotel Regulation.)

The Emergency Court of Appeals answered this question in the negative, for the reason that the question "was not raised in the Protest proceedings with sufficient clarity to have required the Administrator's consideration and ruling."

Petitioners contend that this question should have been answered in the affirmative, for the reason that (a) the question was raised in the Protest proceedings, and (b) the Emergency Court of Appeals itself has ruled in its decision in the within cause that it was the duty of the Administrator to decide which of the two Regulations is better adapted to the practices for Petitioners' building. (Emergency Court of Appeals opinion, p. 6; Transcript of Record, p. 77.)

2. Did the Emergency Court of Appeals err in holding the general averments of the Complaint that Petitioners had a long and continued practice of renting units on a variable or sliding scale of rentals, were "unsupported by evidence"? [3]

Petitioners contend that the Court of Appeals did err in holding that the averments of the long and continued practice of renting units on a variable or sliding scale of rentals were unsupported by the evidence. The record con-

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[3] This is not a question of fact nor a question involving weight of the evidence. The Emergency Court of Appeals held that there was *no* evidence of the practice; not that there was *insufficient* evidence of the practice; not that the *weight* of the evidence did not support the practice.

tains affirmative averments and evidence adduced by Petitioners, that such practice was then currently being maintained, and had been the method of operation for a period of ten years.

The record contains evidence in part in the form of specific admissions by the Office of Price Administration, that the practice of renting on a variable or sliding scale of rentals, was then currently being maintained by Petitioners, and had been their practice over a long period of years.

3. Assuming that the averments of the Complaint in reference to the maintenance of the practice of the variable or sliding scale of rentals over a long period of time, were unsupported by evidence, which is not the fact, did the Emergency Court of Appeals err in holding that general averments, neither admitted nor specifically denied by the Administrator, are insufficient to overcome the presumption of law that the Administrator's decision was proper?

Petitioners contend that the Court of Appeals did err in holding that the averments of the Complaint were not sufficient to overcome the presumption of law that the Administrator's decision is proper. The Administrator's Answer was precise and meticulous and specifically admitted the matters of fact in controversy, and then said that the "other allegations of the Complaint are argumentative, or involve conclusions of law, to which Respondent does not plead. To the extent that the other allegations of the Complaint may be treated as allegations of fact, Respondent denies such allegations."

In the light of the detailed and responsive answer, this general issue was not sufficient to put Complainants on notice that the averments as to the long and continued practice of maintaining the variable and sliding scale of rents was at issue. This is patently so in view of the fact

that the Office of Price Administration had already admitted the existence of the practice (see "Questions Presented," No. 2 above). In *any event,* the averments having been made and the Office of Price Administration having admitted the existence of the practice in prior statements in the proceedings, the Court obviously should not have dismissed the Complaint.

Respectfully submitted,

J. J. Bowman and James S. Bowman,
d.b.a. Bowman Realty Company,
Petitioners.

Paul W. Steer,
Attorney for Petitioners.

Dated Cincinnati, Ohio, April 3, 1944.

STATE OF OHIO, COUNTY OF HAMILTON, SS:

J. J. Bowman, being first duly sworn, deposes and says that he is one of the petitioners in the foregoing petition for writ of certiorari, and that he has read the foregoing petition for writ of certiorari, and knows the contents thereof, and that the same is true except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

J. J. Bowman

Subscribed and sworn to before me this 3rd day of April, 1944.

Lillian Bussey

Lillian Bussey,
Notary Public in and for Hamilton County, Ohio.
My commission expires November 8, 1946.